

September 19, 2005

**AO DRAFT COMMENT PROCEDURES**

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2005-11 is available for public comments under this procedure. It was requested by treasurer Kenneth Batson, on behalf of Friends of Duke Cunningham.

Proposed Advisory Opinion 2005-11 is scheduled to be on the Commission's agenda for its public meeting of Thursday, September 22, 2005.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on September 21, 2005.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

### **CONTACTS**

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2005-11, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

### **MAILING ADDRESSES**

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Associate General Counsel  
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Washington, DC 20463



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

September 19, 2005

**MEMORANDUM**

TO: The Commission

THROUGH: James A. Pehrkon  
Staff Director

FROM: Lawrence H. Norton  
General Counsel

Rosemary C. Smith  
Associate General Counsel

Brad C. Deutsch  
Assistant General Counsel

Ron B. Katwan  
Attorney

Esa L. Sferra  
Attorney

Subject: Draft AO 2005-11

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for September 22, 2005.

Attachment

1   ADVISORY OPINION 2005-11

2   Mr. Kenneth Batson  
3   Treasurer  
4   Friends of Duke Cunningham  
5   P.O. Box 697  
6   San Marcos, CA 92079

**DRAFT**

7  
8   Dear Mr. Batson:

9           We are responding to your advisory opinion request on behalf of Friends of Duke  
10   Cunningham, Representative Randall “Duke” Cunningham’s principal campaign  
11   committee (the “Committee”), concerning the application of the Federal Election  
12   Campaign Act of 1971, as amended (the “Act”), and Commission regulations to the use  
13   of campaign funds to pay legal fees and expenses incurred by Representative  
14   Cunningham in connection with a grand jury investigation. The Commission concludes  
15   that the Committee may use campaign funds to pay for the legal fees and expenses  
16   incurred in connection with the grand jury investigation and legal proceedings that may  
17   arise from this investigation because the investigation concerns allegations that are  
18   directly related to Representative Cunningham’s campaign activities or his duties as a  
19   Federal officeholder and the legal fees and expenses would not exist irrespective of  
20   Representative Cunningham’s campaign or duties as a Federal officeholder. The  
21   Committee may also use campaign funds to pay for the legal fees and expenses incurred  
22   in responding to the press regarding the grand jury investigation and legal proceedings  
23   that may arise from this investigation.

1    ***Background***

2           The facts of this request are presented in your letter received on August 3, 2005,  
3   and the attachments thereto, as supplemented on August 10, 2005, and on Representative  
4   Cunningham's official website.<sup>1</sup>

5           Representative Cunningham is the U.S. Representative from the 50th  
6   Congressional District of California and is a member of the Permanent Select Committee  
7   on Intelligence and the House Appropriations Defense Subcommittee.

8           Your request states that the United States Attorney for the Southern District of  
9   California recently convened a grand jury "purporting to investigate matters related to  
10   Representative Cunningham's conduct in office and campaign fundraising." The grand  
11   jury subpoenaed testimony from Representative Cunningham's Congressional staff, as  
12   well as records from the files of his Congressional office. The grand jury also  
13   subpoenaed records pertaining to contributions to Representative Cunningham's  
14   campaign accounts and the Committee's fundraising activities. Although the details of  
15   the grand jury's investigation are not public at this time, the media reports you submitted  
16   indicate that the investigation appears to be based on two principal allegations: (1) in  
17   November 2003, Mitchell Wade, founder and president of MZM, Inc. ("MZM"), a  
18   Federal defense contractor, purchased a house owned by Representative Cunningham  
19   allegedly at a price above market value, allegedly in order to support MZM's efforts to  
20   secure defense contracts with the U.S. Department of Defense; and (2) Mr. Wade  
21   allegedly allowed Representative Cunningham to live rent-free on Mr. Wade's yacht for  
22   13 months.

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<sup>1</sup> <http://cunningham.house.gov/>

1 ***Questions Presented***

2 1. *May the Committee use campaign funds to pay legal fees and expenses incurred by*  
3 *Representative Cunningham in connection with the grand jury investigation and*  
4 *legal proceedings that may arise from this investigation?*

5 2. *May the Committee use campaign funds to pay legal fees and expenses incurred by*  
6 *Representative Cunningham in responding to the press regarding the grand jury*  
7 *investigation and legal proceedings that may arise from this investigation?*

8 ***Legal Analysis and Conclusions***

9 *Question 1. May the Committee use campaign funds to pay legal fees and expenses*  
10 *incurred by Representative Cunningham in connection with the grand jury investigation*  
11 *and legal proceedings that may arise from this investigation?*

12 Yes, the Committee may use campaign funds to pay for the legal fees and  
13 expenses incurred in connection with the grand jury investigation and legal proceedings  
14 that may arise from this investigation because the investigation concerns allegations that  
15 are directly related to Representative Cunningham's campaign activities or his duties as a  
16 Federal officeholder, or both, and the legal fees and expenses would not exist irrespective  
17 of Representative Cunningham's campaign or duties as a Federal officeholder.

18 The Act identifies six categories of permissible uses of contributions accepted by  
19 a Federal candidate. They are: (1) otherwise authorized expenditures in connection with  
20 the candidate's campaign for Federal office; (2) ordinary and necessary expenses  
21 incurred in connection with the duties of the individual as a holder of Federal office; (3)  
22 contributions to organizations described in 26 U.S.C. 170(c); (4) transfers, without  
23 limitation, to national, State or local political party committees; (5) donations to State and

1 local candidates subject to the provisions of State law; and (6) any other lawful purpose  
2 not prohibited by 2 U.S.C. 439a(b). *See* 2 U.S.C. 439a(a); *see also* 11 CFR 113.2(a)  
3 through (c).

4 Contributions accepted by a candidate may not, however, be converted to  
5 “personal use” by any person. 2 U.S.C. 439a(b)(1); 11 CFR 113.2. Commission  
6 regulations define “personal use” as “any use of funds in a campaign account of a present  
7 or former candidate to fulfill a commitment, obligation or expense of any person that  
8 would exist irrespective of the candidate’s campaign or duties as a Federal officeholder.”  
9 11 CFR 113.1(g); *see also* 2 U.S.C. 439a(b)(2).

10 The Act and Commission regulations list a number of expense categories that  
11 would constitute *per se* personal use, such as household food items or supplies, clothing,  
12 tuition payments, home mortgage, rent, and utility payments. *See* 2 U.S.C. 439a(b)(2);  
13 11 CFR 113.1(g)(1)(i). This list does not include legal fees and expenses. The  
14 Commission considers on a case-by-case basis whether specific, unlisted uses constitute  
15 “personal use.” *See* 11 CFR 113.1(g)(1)(ii). Further, Commission regulations  
16 specifically provide a non-exhaustive list of uses, including “legal expenses,” that are  
17 subject to a case-by-case examination. 11 CFR 113.1(g)(1)(ii). Accordingly, the  
18 Commission analyzes the payment of legal fees and expenses on a case-by-case basis  
19 under 11 CFR 113.1(g)(1)(ii)(A).

20 The Commission has previously concluded that any legal fees and expenses  
21 incurred in legal proceedings involving allegations relating directly to the candidate’s  
22 campaign activities or duties as a Federal officeholder would not exist irrespective of the  
23 candidate’s campaign or duties as a Federal officeholder and therefore may be paid for

1 with campaign funds. *See* Advisory Opinions 2003-17, 1998-1, 1997-12, 1996-24, and  
2 1995-23.

3 Here, you represent that Representative Cunningham will incur legal fees and  
4 expenses associated with a grand jury investigation involving allegations relating directly  
5 to Representative Cunningham's campaign activities or duties as a Federal officeholder,  
6 or both. According to the media reports you submitted, the grand jury investigation  
7 appears to focus on allegations that Representative Cunningham obtained benefits (*i.e.*,  
8 the sale of his house at an above-market price and a rent-free stay on a yacht) from Mr.  
9 Wade because of his status as a U.S. Representative and his position on the Permanent  
10 Select Committee on Intelligence and the House Appropriations Defense Subcommittee.  
11 Thus, based on the representations made in your request and the submitted news articles,  
12 the Commission concludes that the legal fees and expenses associated with the grand jury  
13 investigation would not exist irrespective of Representative Cunningham's campaign or  
14 duties as Federal officeholder. Accordingly, the Committee may use campaign funds to  
15 pay for legal fees and expenses incurred in connection with the grand jury investigation  
16 and legal proceedings that may arise from this investigation.

17 Because the details of the grand jury investigation are not public at this time,  
18 however, it is possible that portions of the investigation could involve allegations not  
19 directly related to Representative Cunningham's campaign activities or his duties as a  
20 Federal officeholder. The use of campaign funds to pay for Representative  
21 Cunningham's representation in legal proceedings regarding any allegations that are not  
22 directly related to his campaign activity or duties as a Federal officeholder would  
23 constitute an impermissible personal use. See Advisory Opinion 2003-17; see also



1 Advisory Opinion 1993-15 (determining that counts within an indictment could be  
2 severed, depending upon whether the counts were related to campaign activity).

3 *Question 2. May the Committee use campaign funds to pay legal fees and expenses*  
4 *incurred by Representative Cunningham in responding to the press regarding the grand*  
5 *jury investigation and legal proceedings that may arise from this investigation?*

6 Yes, the Committee may use campaign funds to pay for the legal fees and  
7 expenses incurred in responding to the press regarding the grand jury investigation and  
8 legal proceedings that may arise from this investigation.

9 In the past, the Commission has determined that legal fees and expenses incurred  
10 to respond to the press concerning allegations that are directly related to the candidate's  
11 campaign activities or duties as a Federal officeholder would not exist irrespective of the  
12 candidate's campaign or duties as a Federal officeholder and therefore may be paid for  
13 with campaign funds. *See* Advisory Opinions 1998-1, 1997-12. Accordingly,  
14 Representative Cunningham may use campaign funds to pay for the legal fees and  
15 expenses incurred in responding to the press regarding the grand jury investigation and  
16 legal proceedings that may arise from this investigation.

17 The Commission notes that in the event that the grand jury investigation involves  
18 allegations that are *not* directly related to Representative Cunningham's campaign  
19 activities or his duties as a Federal officeholder, the Committee may also be permitted to  
20 use campaign funds to pay for certain legal fees and expenses incurred in responding to  
21 press inquiries and stories involving the grand jury and legal proceedings arising from it.  
22 *See* Advisory Opinions 1998-1 and 1997-12. In these Advisory Opinions, the  
23 Commission concluded that for allegations not directly related to campaign or

1 officeholder activity, campaign funds may be used to pay for 100% of any legal fees and  
2 expenses related directly and exclusively to dealing with the press such as preparing a  
3 press release, appearing at a press conference, or meeting or talking with reporters.

4 Campaign funds may also be used to pay for 50% of any other legal fees and expenses  
5 incurred in researching and preparing substantive responses to the press regarding  
6 allegations not directly related to campaign or officeholder activity.

7 In accordance with 11 CFR 102.9(b) and 104.11(b), the Committee must maintain  
8 appropriate documentation of any disbursements made to pay legal fees and expenses  
9 incurred in connection with the grand jury investigation and legal proceedings that may  
10 arise from this investigation, including legal fees and expenses incurred in responding to  
11 the press. *See* Advisory Opinion 2003-17. In addition, the Committee must report all  
12 funds disbursed for such legal fees expenses as operating expenditures, with the purpose  
13 noted. 11 CFR 104.3(b)(2) and (b)(4)(i); Advisory Opinions 2003-17, 1998-1, 1997-12,  
14 and 1996-24.

15 The Commission expresses no opinion regarding the application of state law and  
16 Federal tax or other law, or the rules of the House of Representatives to the proposed  
17 activities, because those questions are not within the Commission's jurisdiction.

18 This response constitutes an advisory opinion concerning the application of the  
19 Act and Commission regulations to the specific transaction or activity set forth in your  
20 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
21 of the facts or assumptions presented, and such facts or assumptions are material to a  
22

1 conclusion presented in this advisory opinion, then the requestor may not rely on that  
2 conclusion as support for its proposed activity.

3

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Sincerely,

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8

Scott E. Thomas

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Chairman

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12 Enclosures (Advisory Opinions 2003-17, 1998-1, 1997-12, 1996-24, 1995-23, and 1993-  
13 15)